Supreme Court, U.S.
FILED
MAY 24 2000
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(2)

No. 99-1504

In the Supreme Court of the United States

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jury on the materiality element of petitioner's mail, wire, and bank fraud offenses was harmless error.

2. Whether a false statement can be material in a fraud prosecution if the victim of the fraud is aware that the statement is false.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 197 F.3d 1122.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1999. The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C.

1962(c)); conspiring to commit that offense (18 U.S.C. 1962(d)); conspiring to defraud a financial institution (18 U.S.C. 371); nine counts of mail fraud (18 U.S.C. 1341); 10 counts of wire fraud (18 U.S.C. 1343); 12 counts of bank fraud (18 U.S.C. 1344); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months of imprisonment, to be followed by five years of supervised release, and was ordered to pay approximately $25 million in restitution. The court of appeals affirmed. 136 F.3d 1459 (1998). This Court affirmed in part, reversed in part, and remanded. 527 U.S. 1 (1999). On remand, the court of appeals again affirmed petitioner's convictions and sentence. Pet. App. 1a-23a.

1. In its prior decision in this case, this Court held that materiality is an element of the mail, wire, and bank fraud statutes under which petitioner was convicted. 527 U.S. at 25. The Court further explained that, "[i]n general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *Id.* at 16 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (describing meaning of materiality under 18 U.S.C. 1001)). Petitioner's jury was not instructed on materiality, and the Court therefore concluded that his trial involved legal error. See *id.* at 25.

The Court also held that the instructional error in petitioner's trial could be harmless under the standard of *Chapman* v. *California*, 386 U.S. 18 (1967): "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" 527 U.S. at 18. In support of that holding, the

Court cited its prior decisions in *Rose* v. *Clark*, 478 U.S. 570 (1986), *Pope* v. *Illinois*, 481 U.S. 497 (1987), and *Yates* v. *Evatt*, 500 U.S. 391 (1991), which involved jury instructions containing unconstitutional presumptions and misdescriptions of elements. See 527 U.S. at 9-10. Because the court of appeals had not applied a harmless-error standard to petitioner's fraud counts, the Court "remand[ed] this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless." *Id.* at 25.[1]

2. On remand, the court of appeals affirmed. Pet. App. 1a-23a. The court concluded that the district court's failure to instruct on materiality was harmless because "the Government's evidence of materiality for each of the[] bank, mail, and wire fraud counts is overwhelming." *Id.* at 13a. In keeping with this Court's description of petitioner's criminal conduct, the court of appeals divided the fraud counts into two main groups: (1) those relating to land acquisition (Counts 2-12, 21-23, 26-28, and 30-33) and (2) those relating to land development (Counts 34-35 and 77-84). Compare 527 U.S. at 4-6 with Pet. App. 3a-9a, 14a-23a. The land acquisition charges involved "land flip" transactions: petitioner would purchase land using a shell corporation, resell the land at a much higher price to a limited partnership that he controlled, and finance the resale with a loan, pocketing the "profit" from the sale. See Pet. App. 14a-16a. With respect to the second group of

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[1] This Court affirmed petitioner's tax fraud offenses because it concluded that the instructional error concerning materiality was harmless with respect to those offenses. 527 U.S. at 19-20. Petitioner's present claims concern only his convictions for mail, wire, and bank fraud; he makes no independent claim of error with respect to his other offenses. See Pet. 3-4; Pet. App. 23a.

charges, concerning land development, petitioner misrepresented various facts and submitted false work invoices to lenders in connection with several construction loans. See *id.* at 18a-23a.

a. Each of the fraud counts relating to land acquisition charged petitioner with making more than one misrepresentation of a material fact in connection with a loan. See Redacted Indictment 11-13 (describing methods of land acquisition fraud), 52, 58, 62-63 (incorporating that description into the corresponding mail, wire, and bank fraud charges). In particular, petitioner was alleged to have obtained the loans by

> (1) submitting inflated appraisals; (2) submitting sales contracts between his nominee corporations and limited partnerships that falsely stated that down payments had been made to the corporations; (3) concealing that the land was being purchased from the original landowners at prices lower than the inflated prices being paid by the limited partnerships; (4) misrepresenting or failing to disclose the nature of his interest in the nominee corporations; and (5) failing to disclose that he was depositing in his personal account the excess loan proceeds his corporations received from the sales to his limited partnerships.

Pet. App. 14a. The court of appeals found that "the evidence overwhelmingly establishes that [petitioner's] representations" about each of those five categories—"his appraisals, purchase prices, down payments, control over the nominee corporation, and receipt of the corporation's excess loan proceeds"—"were material, whether considered individually or collectively." *Id.* at 15a. Thus, the court affirmed petitioner's convictions on Counts 2-12, 21-23, 26-28, 30-31, and 33. *Id.* at 18a.

The court identified one exception to its conclusion concerning the land acquisition charges, stating that Count 32, which charged wire fraud of Greyhound Leasing & Financial Corporation, "merits special discussion." Pet. App. 16a. The court acknowledged that a rational jury could have found that petitioner's "representations about making the down payment"—the second of the five identified categories of falsehoods—"were not material" to Greyhound. *Id.* at 17a. But the court concluded that "this does not mean [petitioner's] conviction on Count 32 must be reversed." *Ibid.* Count 32 also alleged that petitioner made misrepresentations "about his purchase price, control over the nominee corporation, and receipt of the excess loan proceeds." *Ibid.* The court concluded that "[t]he evidence relating to the materiality of each of these representations was so overwhelming that no jury rationally could have found that the representations were not a material matter." *Ibid.* Thus, the court held, "even assuming the false statements concerning the down payment were not material, the jury verdict would have been the same for Count 32." *Ibid.*

In upholding Count 32 on this theory, the court of appeals rejected petitioner's claim, based primarily on *Griffin* v. *United States*, 502 U.S. 46 (1991), that "his conviction should be reversed if just one of the falsehoods alleged to support a count could have been found not material." Pet. App. 13a n.7. The court explained that *Griffin* did "not involve harmless-error analysis." *Ibid.* It reasoned that "harmless-error analysis requires us to focus on whether a jury rationally could have reached a different verdict if properly instructed." *Id.* at 14a n.7.

The court held that, under harmless-error analysis, "the Government * * * is not required to prove that

the evidence overwhelmingly supports the materiality of *every* falsehood alleged for each mail, wire, or bank fraud count." Pet. App. 13a. The court explained that, because wire fraud consists of an individual use of the wires in furtherance of a fraudulent scheme, the government "need not prove every allegation of fraudulent activities appearing in the indictment. It need only prove a sufficient number of fraudulent activities to support a jury inference that there was a fraudulent scheme." *Ibid.* (quoting *United States* v. *Toney*, 598 F.2d 1349, 1355-1356 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980)). Thus, the court concluded, to establish that the failure to instruct on materiality was harmless with respect to a particular count, the government need show only that "the evidence of materiality is so overwhelming for enough of the falsehoods charged in [that] count that no rational jury, properly instructed on the element of materiality, could have acquitted [petitioner] on that count." *Ibid.*[2]

b. The court of appeals also affirmed the convictions relating to land development. Pet. App. 18a-23a. Counts 34 and 35 charged petitioner with mail fraud based on his false representations that various individuals had paid deposits and signed commitments to buy condominiums that he was developing with the aid of loans obtained from two lenders. The court concluded that petitioner's misrepresentations were material because their "tendency and capability * * * to

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[2] Because the failure to instruct the jury on materiality did not "vitiate all the jury's other findings," Pet. App. 14a (quoting 527 U.S. at 11), and petitioner had not previously challenged the findings on falsity, *id.* at 16a, the court "accept[ed] that the jury found that [petitioner's] representations were falsehoods" and limited its "inquiry on remand" to "whether those falsehoods were material," *id.* at 14a.

influence [the lenders'] decisions were established by overwhelming evidence." Pet. App. 19a. The court noted that loan officers testified that petitioner's representations were "of great importance because [the representations] allowed them to gauge whether [petitioner] would be able to make enough sales to repay the loan." *Id.* at 20a. Based on that evidence, the court concluded that "no jury rationally could have concluded that the representations were not material." *Ibid.*

Petitioner claimed that his representations were not material because the lenders "knew or should have known he was making [the] deposits" himself. Pet. App. 19a. He also contended that his statements to the lenders were "literally true" because he did not "expressly state that the purchaser made the deposit." *Ibid.* The lenders "could have contacted the buyers to ask about the source of the deposits or clearly stated in the loan agreements that only the buyer, and not [petitioner], could make the deposit." *Ibid.* The court of appeals concluded that petitioner's claims related to whether the lenders "reasonably relied on [his] representations, and whether [his] representations were actually false." *Ibid.* The court said that petitioner's "arguments about actual knowledge and reasonable reliance miss the point of the materiality inquiry, which is whether the falsehoods at issue had a tendency to influence or were capable of influencing [the lenders'] decisions about [petitioner's] development loans." *Ibid.*

The court reached a similar conclusion with respect to Counts 78-84, which charged petitioner with submitting false construction invoices to support the periodic disbursement of loan proceeds. The invoices were "overwhelmingly" material, the court concluded, be-

cause the lender had "agreed to reimburse [petitioner] only for work actually performed * * * not for future work * * * or for work performed at other projects." Pet. App. 21a-22a. Petitioner claimed the invoices were not material because the lender knew that they were false. *Id.* at 21a. The court held that petitioner's "arguments relate to his intent in submitting the false draw requests and the [lender's] knowledge of the falsity of those requests but not to the materiality of [petitioner's] false representations." *Ibid.* The court repeated its observation that "false statements can be material even if a decision maker was not actually influenced by those statements and knew they were false." *Ibid.*

Finally, with respect to Count 77, the court again found that the "evidence overwhelmingly establishes" the materiality of petitioner's misrepresentations to the lender. Pet. App. 22a. Petitioner told a bank that he needed funds to pay off a second mortgage in favor of an existing trust as part of the development of a piece of property. *Ibid.* Petitioner claimed that his statement was immaterial because, although the trust was not in existence, he was "in the process of creating the trust" at the time he made the statement. *Ibid.* The court of appeals rejected that argument in part because it concerned the falsity rather than the materiality of the statement. *Ibid.* Thus, the court of appeals affirmed all of petitioner's fraud convictions. *Id.* at 23a.

ARGUMENT

1. Petitioner first contends (Pet. 8-17) that the court of appeals erred in affirming his land acquisition convictions without finding that *all* of the false statements involved in each count were overwhelmingly material. He further contends that the approach of the court of

appeals conflicts with this Court's decisions in *Yates* v. *United States*, 354 U.S. 298 (1957), and *Griffin* v. *United States*, 502 U.S. 46 (1991), as well as decisions of other courts of appeals. Petitioner's claims of conflict are incorrect, and he would not be not entitled to relief even under the approach to harmless error review that he advocates. This Court's review is therefore not warranted.

a. In challenging the harmlessness determination on the land acquisition charges, petitioner focuses on Count 32 but also maintains that it "is not an isolated example." Pet. 11 & n.2. With respect to the other counts, however, the court of appeals concluded that all five categories of petitioner's misrepresentations were overwhelmingly "material, whether considered individually or collectively." Pet. App. 15a. Thus, even if petitioner's legal theory were correct, he would not be entitled to relief on those counts. In a footnote (Pet. 11 n.2), petitioner appears to challenge the court of appeals' fact-intensive determination of the strength of the evidence concerning materiality. That challenge does not merit this Court's review.

b. With respect to Count 32, petitioner argues (Pet. 8-17) that reversal is warranted because one of the false statements that he made was arguably not material. That argument depends on the highly unlikely premise that the jury, which convicted petitioner on 73 of 81 charges involving massive fraud (Pet. App. 2a n.2), relied on only one of the five misrepresentations alleged by the government when it convicted petitioner on Count 32 and that the representation it selected happened to be the only one that it rationally could have found to be immaterial. Even if that premise were plausible, however, petitioner's claim would not warrant further review.

Petitioner relies primarily (Pet. 12-14) on *Yates* and *Griffin*. The defendants in *Yates* were charged with conspiring both to "advocate and teach" the violent overthrow of the United States and to "organize" the Communist Party. 354 U.S. at 300. The Court found that the "organizing" object of the conspiracy was legally inadequate because the Communist Party had been "organized" (within the meaning of the statutory prohibition) when it was founded, outside the period set by the statute of limitations. *Id.* at 311-312. Although the "advocate and teach" object was valid, the Court reversed the conspiracy conviction because "the verdict [was] supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

In *Griffin*, the Court explained that *Yates* was an "unexplained" (502 U.S. at 55) extension of earlier cases holding that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Id.* at 53.[3] After explaining that "continued adherence to the holding in *Yates* [was] not at issue in [*Griffin*]," *id.* at 56, the Court refused to extend *Yates* to situations in which the verdict may have rested on a ground that is factually inadequate (because it is not supported by sufficient evidence) rather than legally inadequate (because, as in *Yates*, it is not supported by the language of the statute), see *id.* at 56-60.

Yates and *Griffin* do not conflict with the decision of the court of appeals here. Neither of those cases involved the application of the harmless error rule of

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[3] There is no contention here that petitioner may have been convicted based on conduct that is constitutionally protected.

Chapman v. *California*, 386 U.S. 18 (1967), which had not even been decided at the time of *Yates*. The government contended in *Yates* and *Griffin* that the defendants' convictions should stand because the juries' verdicts *might actually* have rested on adequate rather than inadequate grounds. The government did not rely in either case on the principle that the Court, in its initial decision in this case, held the government may invoke here—that a defendant's conviction may stand, even though the jury's verdict indisputably rested on a legally inadequate ground, if it is clear beyond a reasonable doubt that any rational jury would have found the defendant guilty absent the error.[4]

The result here is governed, not by *Yates* and *Griffin*, but by this Court's initial decision in this case, which relied on its earlier decisions involving harmless error and jury instructions. See *Neder*, 527 U.S. at 9-10 (citing *Rose* v. *Clark*, *supra*; *Pope* v. *Illinois*, *supra*;

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[4] For similar reasons, the decision of the court of appeals does not conflict with the Ninth Circuit's decision in *Keating* v. *Hood*, 191 F.3d 1053 (1999). In that case, the jury instructions described two separate ways of finding the defendant guilty—either as a direct participant or as an aider and abettor. The aiding and abetting instructions were correct, but the instructions describing the direct theory of guilt omitted a required mens rea element. *Id.* at 1057. The State did "*not* argue that * * * the instructional error was harmless" based on overwhelming evidence of the omitted mens rea element. *Id.* at 1062. The State's only argument was that the jury actually convicted the defendant on the aiding-and-abetting theory rather than the direct-participant theory. *Ibid.* The court of appeals rejected that argument. See *id.* at 1063-1064 & n.16. Moreover, in a footnote, the court of appeals specifically found that the evidence of the omitted mens rea element was *not* overwhelming and therefore concluded that the instructional error could not be harmless "under any of the possible approaches" to determining harmless error. *Id.* at 1064 n.17.

and *Yates* v. *Evatt*, *supra*). *Neder* establishes that, when jury instructions either misdefine or omit an element, the error is harmless if the reviewing court determines beyond a reasonable doubt that the "verdict would have been the same absent the error." 527 U.S. at 19. As the court of appeals recognized (Pet. App. 13a n.7), the fundamental holding of this Court's initial decision in this case is that reviewing courts may affirm a conviction despite a "'gap' between what the jury did find * * * and what it was required to find" (527 U.S. at 13-14) if the record evidence could not rationally support a verdict for the defendant. See *id.* at 19.[5]

This Court's resolution of any tension that may exist between its earlier holding in this case and the principle underlying *Yates* and *Griffin*, see *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); *id.* at 1068 (Rymer, J., concurring in part and dissenting in part), would be premature at this time. There is no conflict among the courts of appeals on that question; the decision of the court of appeals on remand is the first decision to address that issue. See notes 4-5, *supra*; *Keating*, 191 F.3d at 1064 n.17 (reserving question).[6]

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[5] To the extent that petitioner invokes (Pet. 12) appellate decisions that, in reliance on *Yates* and *Griffin*, reject the principle that this Court endorsed in its initial opinion in this case, those decisions predate that opinion, on which the court of appeals here relied, and therefore they do not present a square conflict with the decision in this case. See, *e.g.*, *United States* v. *Ienco*, 92 F.3d 564, 570 (7th Cir. 1996) (reversing conviction under 18 U.S.C. 924(c), which makes it a crime to "use[]" or "carr[y]" a firearm in certain circumstances, based on an erroneous "use" instruction and despite the government's claim that there was "conclusive" evidence of carrying).

[6] In addition, the court of appeals appears to have been influenced in its analysis by its understanding of the instructions on remand from this Court. See Pet. App. 10a (describing remand on

c. This Court's review is particularly unwarranted because petitioner would not be entitled to relief even under the harmless error analysis that he advocates. Petitioner contends that the government should be required "to show that the evidence of all the elements of * * * wire * * * fraud—including intent and falsity, as well as materiality—was so overwhelming with respect to some falsehood alleged in [Count 32] that no jury could have acquitted." Pet. 10. The evidence satisfies that proposed standard for not just one but at least three of the falsehoods alleged in connection with Count 32—(1) petitioner's concealing that the land was purchased from the original landowner at a price lower than the inflated price paid by the limited partnership, (2) petitioner's failure to disclose his control over the nominee corporation that made the original purchase, and (3) petitioner's failure to disclose his intent to retain for himself the excess loan proceeds.

As described at page 5, *supra*, the court of appeals expressly and correctly determined that the evidence supporting the materiality of each of those falsehoods was overwhelming. See also Pet. App. 17a. The evidence of falsity was also overwhelming for each of the

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harmless error as follows: "To determine whether the removal of an element from the jury's consideration is harmless error, this Court is to consider 'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" (quoting *Neder*, 527 U.S. at 19); see also *id.* at 14a ("[I]n our harmless error analysis, we accept that the jury found that [petitioner's] representations were falsehoods, and our inquiry on remand is only whether those falsehoods were material.") Those particular features of the case may limit or qualify the scope of the court's holding on the appropriate form of harmless error analysis in a case of this kind.

falsehoods. The evidence overwhelmingly showed that the inflated price that petitioner submitted to Greyhound was $2 million higher and more than twice the price that his nominee corporation had paid for the land only three days earlier. See 15 R. 234; 16 R. 104-105, 183-184; 20 R. 30-31. The evidence also overwhelmingly showed that petitioner misrepresented his true interest in the nominee corporation by stating he had no interest, even though he had instructed that it be created and had endorsed to himself the check for $730,269.26 that it received for the sale of the property. See 13 R. 14; 14 R. 33; 15 R. 218-234; 16 R. 89-96, 104-105, 107-108, 183-184; 20 R. 30-31; 43 R. 257-258; 44 R. 65-71. And the evidence overwhelmingly showed that petitioner deposited in his personal bank account the more than $730,000 in excess loan proceeds that the corporation received. 13 R. 85; 16 R. 222; 30 R. 136-139.

Finally, the evidence was overwhelming that petitioner made each of the falsehoods with the intent to defraud Greyhound. The evidence overwhelmingly established that petitioner knew that Greyhound would not have made the loan if it had been aware of the true price of the land, the fact that petitioner was both the buyer and the seller in the transaction reported to it, or the fact that he would personally profit by more than $730,000 from the distribution of the loan proceeds. See 16 R. 77, 87-96, 98-101, 104-108, 155, 167-176, 183-184.

Moreover, even if the evidence were not sufficient to sustain petitioner's conviction on Count 32, reversal of that count would not reduce petitioner's terms of imprisonment or supervised release. As noted at page 9, *supra*, petitioner was convicted of 73 of the 81 charges submitted to the jury. His five-year term of imprisonment for Count 32 was imposed concurrently with his terms of imprisonment for 61 of those other

convictions. Judgment 2. No supervised release was imposed in connection with Count 32. *Id.* at 3. Under those circumstances, further review of this case by this Court is not warranted.

2. With respect to his convictions on the land development charges, petitioner claims (Pet. 18-26) that the court of appeals erred in concluding that a false statement can be "material" even though the recipient of the statement knows it is false. Petitioner further contends that this conclusion conflicts with decisions of other courts of appeals. Those contentions lack merit.

a. In its prior decision in this case, the Court held that, in this context, a false representation generally is material if it has either "a natural tendency to influence" or is "capable of influencing" the victim. 527 U.S. at 16. The victim's knowledge that a representation is false is usually not relevant to whether that standard is satisfied because the standard turns on the representation's "*capability* of influencing" the victim, not its actual influence. *United States* v. *Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988). In other words, the test for materiality concerns "the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." *United States* v. *Goldfine*, 538 F.2d 815, 820-821 (9th Cir. 1976). Thus, the fact that the victim discovers the truth after the false statement is made, or knows about it in advance, generally does not make the statement any less material. See, *e.g.*, *United States* v. *Johnson*, 139 F.3d 1359, 1364 (11th Cir. 1998), cert. denied, 119 S. Ct. 2365 (1999); *United States* v. *LeMaster*, 54 F.3d 1224, 1230-1231 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996); *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987) (citing cases). As this Court stated in an analogous context, an exception from

liability for false statements that would "turn upon the credulousness of the [victim] (or the persuasiveness of the [defendant]) would be exceedingly strange." *Brogan* v. *United States*, 522 U.S. 398, 402 (1998) (rejecting "exculpatory no" exception to 18 U.S.C. 1001).

b. Petitioner mistakenly relies (Pet. 22-26) on this Court's decision in *Kungys* v. *United States*, 485 U.S. 759 (1988), in which the plurality stated that materiality turns on "what would have ensued from * * * knowledge of the misrepresented fact." *Id.* at 775 (opinion of Scalia, J., joined by Rehnquist, C.J., and Brennan, J.). The plurality made that statement in holding that a false statement is not material merely because, if the defendant had instead told the truth, that action would have influenced the victim by revealing the falsity of an earlier statement. "What must have a natural tendency to influence the [victim] is the misrepresentation *itself*, not the failure to create an inconsistency with an earlier misrepresentation." *Id.* at 776 (plurality opinion) (emphasis added).

Indeed, the Court in *Kungys* made clear that materiality does not turn on hindsight, but on "whether the misrepresentation or concealment was *predictably* capable of affecting, *i.e.*, had a natural tendency to affect," the victim. 485 U.S. at 771 (emphasis added). The Court made clear that it "has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Ibid.* Thus, as the court of appeals in this case understood, it does not matter what actually *would* have happened as a result of the false statement given the other information available to the victim, but what *could* have happened had that other information *not* been available.

c. Petitioner also errs in contending (Pet. 20-21) that the decision of the court of appeals here conflicts with decisions of other courts of appeals construing the securities laws. Those decisions involve different statutes and a different theory of harm and, in that context, materiality takes on a different meaning. Materiality in the securities context requires consideration of whether a particular representation "significantly altered the 'total mix' of information available." *Basic Inc.*, v. *Levinson*, 485 U.S. 224, 232 (1988). Because that standard considers the "total mix" of information, knowledge already possessed by investors is highly relevant. The standard at issue here, however, does not contain that element. See *Neder*, 527 U.S. at 16 ("natural tendency" test); *id.* at 22 n.5 (Restatement (Second) of Torts test).

Petitioner principally relies on the Ninth Circuit's decision in *In re Convergent Technologies Securities Litigation*, 948 F.2d 507 (1991), a "fraud on the market" case involving Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). The plaintiffs, purchasers of Convergent's stock, sued the corporation's officers and others for making misrepresentations in a prospectus. They claimed that the misrepresentations influenced the market price for the stock and that they were harmed because they relied on the integrity of the stock as established by the market price. 948 F.2d at 512-513 & n.2. The court held that an omission could be "materially misleading only if the information has not already entered the market." *Id.* at 513. Unlike the victims of the mail, wire, and bank frauds at issue in this case, the victims in *Convergent* did not claim that they were misled by the defendants' false statements, but by the actions of the market in reliance on the false statements. Because the market price reflected the

truth, however, the victims had not been deceived at all. Accord, *e.g.*, *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1206-1207 (1st Cir. 1996) (cited at Pet. 20) (rejecting fraud-on-the-market theory because "the investing public had at least a year's worth of hard financial data * * * to evaluate" the effect of a corporate policy change before the change was touted by the corporation as a means of boosting revenues).

As noted above, the courts of appeals, including the Ninth and First Circuits, continue to recognize that, in the context of the fraud involved in this case, a victim's knowledge does not render a false statement immaterial. See *Goldfine*, 538 F.2d at 820-821; *Corsino*, 812 F.2d at 30.[7] That is the question presented here, and it is one on which the courts of appeals are not divided. This Court's review is not warranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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MAY 2000

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[7] As petitioner himself recognizes (Pet. 20-21), the Eighth Circuit likewise recognizes that materiality takes on a different meaning in the context of the securities laws than in the context presented here. Compare *Whitaker*, 848 F.2d at 916, with *Parnes* v. *Gateway 2000, Inc.*, 122 F.3d 539, 546 (1997).